Supreme Court, U.S.
FILED
(1)
991254 JAN 27 2000
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1999

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

GREGORY L.A. THOMAS,

Petitioner,

V.

DISTRICT OF COLUMBIA COURT OF APPEALS BOARD ON PROFESSIONAL RESPONSIBILITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Gregory L.A. Thomas
613 Pennsylvania Avenue, S.E.
First Floor
Washington, D.C. 20003
202-347-1300

IN PROPER PERSON
(Pro Se)

150 pp

QUESTIONS PRESENTED

I. WHETHER, BASED UPON CONTROLLING PRECEDENTS OF THIS COURT, A PRIMA FACIE CASE OF FOURTH AMENDMENT VIOLATION WAS ESTABLISHED, WHERE RESPONDENT RATIFIED SERVICE OF FIVE SEPARATE SUBPOENA DUCES TECUM UPON BANK ACCOUNT WITHOUT REQUISITE NOTICE TO DEPOSITOR, AND WHERE FORMAL DISBARMENT PROCEEDINGS ARE INSTITUTED AGAINST DEPOSITOR BASED UPON EVIDENCE OBTAINED, MANDATE THAT THE EXCLUSIONARY RULE APPLY?

II. WHETHER AN APPELLATE COURT ON REVIEW OF DISBARMENT PROCEEDINGS, CONSISTENT WITH DUE PROCESS, MAY

DECLARE AN ADJUDICATIVE RIGHT BUT THEN, AFTER THE PARTY TO THE LITIGATION HAS FULLY COMPLIED WITH PROCEDURES PRESCRIBED FOR ASSERTING THE RIGHT, DECLINE TO RULE UPON THE MERITS OF THE PARTY'S FOURTH AMENDMENT UNLAWFUL SEARCH AND SEIZURE CLAIM?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES v
LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW ix
CORPORATE AFFILIATES OF THE FILING PARTY ix
OPINIONS BELOW 2
STATEMENT OF JURISDICTION 2
CONSTITUTIONAL PROVISIONS, TREATIES, RULES AND REGULATIIONS INVOLVED 3
STATEMENT OF THE CASE 4
REASONS FOR GRANTING THE WRIT 12
I. The Appellate Court's Holding That Petitioner Waived Issue Of Fundamental Right of Notice Did Not Constitute Independent Nonfederal Ground For Judgment And It was Error To Decline To Rule On Underlying Fourth Amendment Constitutional Claim On The Merits. 12
II. Service of Subpoena Duces Tecum Upon Petitioner's Trust Account, Without Requisite Notice, Was Bad Faith And Deliberate Violation Of The Fourth Amendment To The United States Constitution. 14

TABLE OF CONTENTS (CONTIN'D)

III. The Appellate Court's Construction Of The Civil And Board Rules As Requiring Notice As Advanced By Petitioner While Declining To Adjudicate A Remedy For Underlying Constitutional Violations Was Repugnant To The Due Process Clause Of The Fifth Amendment To The United States Constitution. 20

CONCLUSION 29

APPENDIX 31

TABLE OF AUTHORITIES

CASES: PAGE

. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) 15

Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673 (1930) 21

California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974) 17-18

Evans v. Evans, 441 A.2d 979 (D.C. App. 1982) 13

Garrity v. New Jersey, 385 U.S. 493, 500 (1967) 20

Gonzalez-Rivera v. I.N.S., 22 F.3d 1441 (9th Cir. 1994) 15-16, 19-20

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 21

Mullane v. Central Hanover B. & T. Co., 339 U.S. 306 (1950) 13

Scott v. United States, 135 U.S. App. D.C. 377, 419 F.2d 264 (D.C. Cir. 1969) 16-17

Travelers Ins. Co. v. Haden, 418 A.2d 1078 (D.C. App. 1980) 28-29

Travelers Ins. Co., v. District of Columbia, 382 A.2d 269 (D.C. App. 1978) 26

United States v. Miller, 425 U.S. 435 (1976) 18

Washington Metro. Area Transit Auth. v. Reid, 666 A.d 41 (D.C. App. 1995 26-27

Williams v. United States, 470 A.2d 302 (D.C. App. 1983) 21

STATUTES:

D.C. Code § 11-946 13

D.C. Code § 36-335(b) 27

FEDERAL STATUTES:

18 Stat 473 13

COURT RULES:

Super. *Ct. Civ. R. 45(b)(1)* 12-13, 18-19

Super. Ct. Civ. R. 5(b) 13

Super. R. Crim. P. 12(b)(3) 13

FEDERAL RULES:

Fed. R. Civ. P. 45(b)(1) 12, 18-19

Fed. R. Crim. P. 17 17

REGULATIONS:

Rule *XI, § 3(a)* 23

Rule XI, § 3(a)(5) 24

Rule XI, § 3(b) 25

BOARD RULES:

Rule 13.7 24

Rule 6.2 24

Rule 7.11 13

UNITED STATES CONSTITUTION:

5th Amendment 19

4th Amendment 15, 19

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Mr. Rezneck, a member of the Board on Professional Responsibility, abstained from the Board's Report and Recommendation of May 7, 1998 and is not a party to this proceeding. *Appendix p. 102.*

CORPORATE AFFILIATES OF THE FILING PARTY

Pursuant to Sup. Ct. R. 29.6, there are no corporations, parents or subsidiary companies to be listed.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1999

GREGORY L.A. THOMAS,

Petitioner,

V.

DISTRICT OF COLUMBIA COURT OF APPEALS BOARD ON PROFESSIONAL RESPONSIBILITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner, Gregory L.A. Thomas ("Petitioner"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in this matter on November 12, 1999.

OPINION BELOW

The District of Columbia Court of Appeals, whose judgment is herein sought to be reviewed, before Steadman and Ruiz, Associate Judges, and Gallagher, Senior Judge ("The Appellate Court"), is unpublished in a reporter having been rendered on November 12, 1999 in Appeal No. 98-BG-713 and is reprinted in the Appendices to this Petition, at page 29. The prior consolidated Report and Recommendation of the District of Columbia Court of Appeals Board on Professional Responsibility ("The Board") in Docket Nos. BDN: 184-93 & 343-93 entered on May 7, 1998 and along with its separate concurring opinion respectively, are also appended to this Petition, at page 58.

STATEMENT OF JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on November 12, 1999. Motion to Stay Judgment was denied on January 7, 2000. This petition for

certiorari was filed within 90 days of those dates. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(b).

CONSTITUTIONAL PROVISIONS, RULES, STATUTES AND REGULATIONS INVOLVED

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

U.S. Const. amend. V, Appendix p. 109.

> .. . . Prior notice of any commanded production of documents and things or inspection of

premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

Super Ct. Civ. R. 45(b)(1). [1]

Super. Ct. Civ. R. 5(b),[2] *Appendix p. 110.*

D.C. Code § 11-946, Appendix p. 112.

D.C. *Bar XI , § 18(a), Appendix p. 113.*

D.C. Bar XI, § 3(a)(5), Appendix p. 113.

D.C. Bar XI, § 3(b), Appendix p. 114.

Board Rule 6.2, Appendix p. 115.

Board Rule 7.11, Appendix p. 115.

STATEMENT OF THE CASE

On May 17, 1993, during Petition's representation of another attorney in disbarment proceedings before the Board, Bar Counsel initiated unsolicited contact with another client of Petitioner, who had made written inquiry to the then offices of the Attorney-Client Fee Arbitration Board.

---

[1] Super. Ct. Civ. R. 45(b)(1) is identical to Fed. R. Civ. P. 45(b)(1).

[2] Super Ct. Civ. R. 5(b) is identical to Fed. R. Civ. P. 5(b).

Following several inquiries from Bar Counsel concerning the matter, Petitioner provided written notification to the client and Bar Counsel on November 23, 1993 of intent to withdraw as counsel in ongoing litigation involving the client and impending disbursement of all disputed moneys.

In response, commencing on December 2, 1993, Bar Counsel served the first of five subpoena duces tecum upon Petitioner's trust account held at a local depository bank. The bank complied with this first subpoena request on December 4, 1993.

Prior to service of the subpoena demand on the bank and the notification of withdrawal, the Board's Hearing Committee Number Five had issued an oral post-hearing decision on November 19, 1993, exonerating Petitioner's client subject to disbarment proceedings of serious wrongdoing and recommended sanction of "brief suspension."

On December 9, 1993 all disputed moneys were disbursed to the client and a copy of the transaction provided

to Bar Counsel. Having obtained the bank records schedule of disbursements of disputed moneys, a subpoena duces tecum was then served upon Petitioner for the same bank records already received. When Petitioner failed to comply judicial enforcement proceedings were instituted. *Appendix p. 106.*

During pendency of these proceedings and almost a year following disbursement of all disputed moneys, a second subpoena duces tecum was served upon Petitioner's trust account on November 21, 1994.

Upon oath and bank records obtained from the bank account, a formal disbarment proceeding was instituted against Petitioner on December 22, 1994 in Docket No. 184-93 pertaining to Petitioner's handling of disputed moneys disbursed to the client more than a year previously, without any objection, predicated upon ethical violations allegedly having occurred almost 3½ years past, charging, to writ: misappropriation, commingling, failure to keep records,

failure to keep client informed, dishonesty, fraud, deceit, misrepresentation and conduct prejudicial to administration of justice.

Hearings were held on these charges before the Board's Hearing Committee Number Five on August 9, 1995, October 10 and 11, 1995, November 13, 1995 and, concluding on April 10, 1996, respectively. Petitioner asserted the right to assistance of counsel.

It was uncontroverted by the evidence that Petitioner lacked any knowledge his bank records had been subpoenaed. Although it was argued that bank record evidence must be suppressed, it was admitted over objection. *Appendix p. 117.*

On August 31, 1995, after hearings commenced in the Docket No. 184-93, a third subpoena duces tecum was served on Petitioner's trust account at his depository bank. The Bank complied with this subpoena demand on October 10, 1995. During the proceedings, a fourth subpoena duces tecum was

served on Petitioner's trust account on December 1, 1995. The Bank complied with this request on December 14, 1995.

When the hearings had been concluded and the Board's Hearing Committee Five's decision was pending final resolution, the District of Columbia Court of Appeals issued its opinion regarding Petitioner's client subject to disbarment proceedings cited as In Re Ray, 675 A.2d 1381 (D.C. App. 1996). The case was subject to judicial review on Bar Counsel's exceptions. *Id. at 1384.*

Within weeks of rendering of the Court's decision, *supra*, and during continuing pendency of Docket No. 184-93 concerning Petitioner's disbarment before the Board's Hearing Committee Number Five, a fifth subpoena duces tecum was served on Petitioner's trust account on May 22, 1996. The Bank complied on May 28, 1996.

On August 21, 1996, a second disbarment proceeding was instituted against Petitioner in Docket No. 343-95 charging, to writ: misappropriation for failure to safekeep a

client's property and failing to keep complete records for handling and disposition of funds belonging to another person. The charges came on for hearing on October 17, 1996 before the Board's Hearing Committee Number Seven. As in the case of Docket No. 184-93, Bar Counsel's subpoena power was put at issue. *Appendix p. 130.*

On July 2, 1997, the Board's Hearing Committee Number Seven issued its written decision and concluded that Bar Counsel failed to meet its burden with respect to disbarment and recommended sanction of informal admonishment in Docket No. 343-95, without exception having been filed.

Subsequently, and more than a year-and-a-half after the record had been closed, the Board's Hearing Committee Number Five issued its decision on November 3, 1997 in Docket No. 184-93 and recommended sanction of disbarment. Petitioner and Bar Counsel excepted to the Board.

After oral argument on January 22, 1998 on exceptions noted, the Board issued its Report and Recommendation on May 7, 1998 consolidating Bar Docket Number 184-93 with Bar Docket Number 343-95, even though no exception had been filed in the latter docketed case.

The Board reasoned that Bar Counsel had a "reasonable basis to suspect a rule infraction had occurred" ... "[t]his suspicion ripened into probable cause and more ..." It then concluded the bank records were not "tainted" and issuance of subpoena duces tecum upon Petitioner's trust account to scrutinize various banking transactions, without notice to Petitioner, and prior to institution of formal disciplinary charges, not only was appropriate but lawful exercise of its investigative authority. *Appendix p. 78, 96.*

The Board also opinioned that under this Court's precedent, Petitioner did not enjoy a Fifth Amendment privilege in the bank records and had been afforded all the

due process to which he was entitled. Appendix p. 79. It was further suggested that because conduct alleged in Docket No. 343-95 occurred after proceeding in Docket No. 184-93, a more severe sanction than informal admonishment may have been warranted. *Appendix p. 100.*

The Appellate Court, citing Fourth Circuit precedent, overruled the Board and declared under civil and Bar rules notice was required upon service of a subpoena duces tecum for documents but declined Petitioner relief for failure to raise before the Board how the civil rules are to apply to disbarment proceedings. Further, citing *California v. Shultz, 416 U.S. 21 (1974),* as with the Board, The Appellate Court could discern a Fifth Amendment violation. *Appendix p. 50-52.*

While echoing a deference standard of review as to the Board, The Appellate Court went on and pronounced Petitioner's disbarment as to both cases. *Appendix p. 42.*

On December 20, 1999, Petitioner sought stay of The Appellate Court's judgment pending certiorari such motion having been denied on January 7, 2000. *Appendix p. 109.*

This petition for writ for certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Appellate Court's Holding That Petitioner Waived Issue Of Fundamental Right of Notice Did Not Constitute Independent Nonfederal Ground For Judgment And It was Error To Decline To Rule On Underlying Fourth Amendment Constitutional Claim On The Merits.

In declaring a substantive right to notice under Super. *Ct. Civ. R. 45(b)(1),* The Appellate Court relied solely on federal law. Not only is *Super. Ct. Civ. R. 45(b)(1)* identical to *Fed. R. Civ. P. 45(b)(1)* but pursuant to *D.C. Code §*

11-946 (formerly *18 Stat 473*) District of Columbia procedures concerns matters inherently federal in nature.

Furthermore, in construing requirements of *Super. Ct. Civ. R. 5(b),* which is also identical to the Federal Rule and was made applicable to *Super. Ct. Civ. R. 45(b)(1)* by 1991 amendments providing for notice and opportunity to heard have the effect of denying a litigant due process of law. Evans v. Evans, *441 A.2d 979, 980 (D.C. App. 1982);* see also Mullane v. Central Hanover B. & T. Co., *339 U.S. 306, 314 (1950) (holding elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present objections).*

Moreover, under Board Rules, evidentiary matters may be raised during a hearing. *Board Rule 7.11 (Appendix p. 115)* compare *Super. R. Crim. P. 12(b)(3).*

In the instant case, Petitioner strenuously argued before the Board's Hearing Committee Numbers Five and Seven, respectively that subpoenaed bank records must be suppressed and disregarded as tainted evidence.

Committee Number Five admitted the evidence provisionally whereas to Bar Counsel's embarrassment, Committee Number Seven found insufficient evidence to sustain disbarment. *Appendix p. 125, 135.*

In other words, the issue of how the civil rules are to apply to Bar Counsel proceedings was an integral part of the disbarment proceedings and were not only ripe but properly before The Appellate Court for review.

II. Service of Subpoena Duces Tecum Upon Petitioner's Trust Account, Without Requisite Notice, Was Bad Faith And Deliberate Violation Of The Fourth Amendment To The United States Constitution.

Despite the Board's conclusion as to the frivolity as to Petitioner's "vindictiveness" claims and bestowal of its most highest laurels upon Bar Counsel with The Appellate Court's affirmance, this Court has affirmed its long held belief that egregious violations of the *Fourth Amendment* or other liberties that undermine the probative value of evidence obtained warrants application of the exclusionary rule, nature of the proceeding notwithstanding. *INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984).*

In *Gonzalez-Rivera v. I.N.S., 22 F.3d 1441* (9th Cir. 1994) the Court was directly confronted with proper application of the "egregious" conduct standard. There, it was first observed that whether conduct is sufficiently egregious under the Fourth Amendment may be measured by a good faith standard and is a question of law requiring review *de novo*. *Id. at 1449.* (citations omitted).

The Court then went on to reject arguments to the contrary, and applied the exclusionary rule holding the

government officers should have known that their decision was unconstitutional, and that under the circumstances, it could not conclude that they acted on a good faith belief that their conduct was constitutionally permissible. Id. at 1450-51.

In Scott v. United States, 135 U.S. App. D.C. 377, 419 F.2d 264 (D.C. Cir. 1969,), the same principle was succinctly stated within a prosecutorial context:

> [T]he standards which guide prosecutors in the exercise of their discretion are as much a part of the law as the rules applied in court. Indeed, the impact of such standards is more decisive for many [respondents] than any other legal rules. If it is procedure that spells much of the difference between rule by law and rule by whim or caprice, the same or more can be said of well-articulated, evenly applied standards for prosecution discretion. If we must as a practical matter rely upon prosecutors to apply

> these standards in good faith, the responsibility for articulating appropriate standards must belong to the courts, not prosecutors ...

Id. 135 U.S. App. D.C. at 390, 419 F.2d at 277 (citations omitted) (emphasis added).

Furthermore, The Appellate Court's reliance on *California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974)* in adjudicating the Fifth Amendment privilege issue is misplaced.

In *Shultz, supra*, the Congressional plenary power to enact a criminal statute was at issue and, preemptively, controlled by *Fed. R. Crim. P. 17* as far as any question concerning exercise of a court's subpoena power, as distinguishable from civil rules as The Appellate Court found to apply in the case here. Indeed, the *Shultz* Court specifically declined to adjudicate Fourth and Fifth Amendment rights asserted on behalf of depositors finding the claims premature. *Id. at 69, 75.*

As often emphasized by this Court, access to the records maintained by banks is controlled by "existing legal process," *United States v. Miller, 425 U.S. 435 (1976) citing California Bankers Assn. v. Shultz, 416 U.S. 21, 52 (1974).*

Since this Court's holding in Miller and California Bankers Assn., supra, "existing legal process" for service of civil subpoena duces tecum has been altered with amendment of *Fed. R. Civ. P. 45(b) and Super. Ct. Civ. R. 45(b)* in 1991.

Under the federal rendition, which is identical to the D.C. Rule except for references to mile limits to preserve geographic proportionality to the local court, the purpose of revisions were to clarify and enlarge protections afforded persons required to assist the court by giving information, and make explicit that an attorney acts as an officer of the court in signing and issuance of subpoenas. Necessarily accompanying evolution of the power of an attorney as officers of the court is the development of increased responsibility and liability for

misuse of such power. *Super. Ct. Civ. R. 45 comment compare with Fed. R. Civ. P. 45 advisory committee note.*

Hence, as was held in *Gonzalez-Rivera* in addressing government assertions that probative value of evidence testimonial in character is not undermined under the Fifth Amendment by the manner in which it is obtained, the Court squarely held, "when evidence is obtained by deliberate violation of the is Fourth Amendment, or by conduct a reasonable officer should know in violation of the Constitution, the probative value of that evidence cannot outweigh the need for judicial sanction." *Id. at 1451.* It would also seem to follow that the same principle has equal application here.

First, Board and the civil rule are unequivocal with respect to notice requirements in service of subpoena duces tecum. The facts do not bare out an isolated incident but rather involves a brazen pattern of disregard of the rules of the court spanning at least 18 months involving 5 separate

violations. Many of the subpoena duces tecum were issued during or pending judicial proceeding when the practice itself was under direct without any effort to serve notice on Petitioner or counsel. The subsequent institution of enforcement proceedings for documents already obtained not only compounds the gravity of the violations but dispenses with any argument based on good faith.

Although *Gonzalez-Rivera* involved an immigration proceeding and not particularly analogous to the fact pattern here, there is absolutely no justification under the constitution that an illegal foreign national in the State of California should enjoy greater liberty than a citizen in the District of Columbia. Lawyers are not relegated to a water-down version of constitutional rights. *Cf Garrity v. New Jersey, 385 U.S. 493, 500 (1967).*

III. The Appellate Court's Construction Of The Civil And Board Rules As Requiring Notice As Advanced By Petitioner While Declining

To Adjudicate A Remedy For Underlying Constitutional Violations Was Repugnant To The Due Process Clause Of The Fifth Amendment To The United States Constitution.

A. In *Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673 (1930)*, this Court held that it is violative of due process for a state court to grant an adjudicative right in a manner that denies the same right or remedy to a prevailing party involved in the litigation but for no fault of his own. *See Williams v. United States, 470 A.2d 302 (D.C. App. 1983) (citing Brinkerhoff-Faris Trust & Savings Company, 281 U.S. 673, supra, and Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) identifying factor test for evaluating whether a new rule of law should apply retroactively, or prospectively).*

Applying that criteria to the case at Bar, The Appellate Court's holding concerning notice under the civil rules clearly

does not represent "a clear break from the past." Indeed, The Appellate Court could cite but one federal case where the issue of notice was at issue and that appeared in a footnote giving rise to an inference, aside from Bar Counsel, every party under the Constitution would seem to comply with notice requirements under the rule

Moreover, Petitioner should be rewarded for advocating against misapplication of Board and civil rules in vindication of a substantive right not only for members of the Bar but the public at large.

In short, The Appellate Court's declaration that notice is required in service of subpoena dues tecum under the civil rules, prospectively, was entirely uncalled for.

B. Although sanction of informal admonishment was not excepted in Bar Docket No. 343-95, Petitioner timely challenged its *sua sponte* joinder with of Bar Docket Nos. 184-93 in the Board's report and recommendation. *Appendix at p. 138.*

The Appellate Court apparently concluded that "[t]he Board recommended disbarment on the basis of both matters." *Appendix p. 42.* However, in its report and recommendation the Board would seem to hold that " [t]he violation in Bar Docket No. 343-95, namely failing to keep complete records of his handling and disposition of client funds, would, if it were the sole violation committed by Respondent, likely carry a sanction of less than a suspension. But because it occurred after the conduct in the first matter had been brought to Bar Counsel's and Respondent's attention, a more severe sanction may have been warranted." *Appendix p. 99-100.* Thus, leaving an impression sanction of informal admonition as recommended by Hearing Committee Seven would remain undisturbed.

In any event,, Rule *XI, § 3(a)* provides for the types of disciplinary sanctions and under what authority they may be imposed. Informal admonition may be imposed by Bar

Counsel alone and must be in writing. *Rule XI, § 3(a)(5); Board Rule 6.2 Appendix p. 114.* Additionally, *Board Rule 13.7* pertaining to Informal Admonitions and Reprimands Following Board Proceedings provides:

> When the Board determines that the proceeding should be concluded by an informal admonition, or by a reprimand, the Board shall direct Bar Counsel to informally admonish respondent in writing including a brief statement of the reasons therefor or the Board shall issue an order reprimanding respondent.

Board Rule 13.7.

In the instant case, the record is replete of any evidence Bar Counsel or the Board ever informally admonished Petitioner either in writing or order. The Board's Hearing Committee Number Seven concluded the evidence was insufficient to sustain disbarment. Indeed, the Board held

"[t]he violation that was found does not stem from any subpoena bank records but rather from the `non-records.'" *Appendix p. 97, 135*

It is therefor submitted that The Appellate Court's pronouncement of disbarment in Bar Docket No. 343-95 was constitutionally equivalent to remanding Petitioner to the gallows on a jury return of acquittal.

C. Bar Rule XI, § 3(b) empowers the Court or Board to require an attorney to make restitution either to persons financially injured by the attorney's conduct or to the Client Security Trust Fund or both, or allows for imposition of any other reasonable condition as a condition of probation or reinstatement. *Appendix p. 115.* In the instant case, the Board clearly declined to recommend restitution as The Appellate Court would seem to have it. *Appendix p. 101.*

While acknowledging Petitioner's client never received workers' compensation benefits pursuant to requisite order and thereby defeating any claim of a statutory lien on

any third party recovery, The Appellate Court held that "[t]here is a factual issue in this case concerning waiver of INA's claimed lien against the settlement proceeds from Hilton. The existence and amount of the lien need not be resolved at this time. Restitution of any amount which is to be owed by Thomas to INA is a factor that should be considered in Thomas' reinstatement petition." *Appendix p. 58.* There is absolutely no factual or legal support for The Appellate Court's shifting responsibility of an equitable lien to Petitioner, even assuming no waiver occurred..

In *Washington Metro. Area Transit Auth. v. Reid, 666 A.d 41 (D.C. App. 1995), citing Travelers Ins. Co., v. District of Columbia, 383 A.2d 269 (D.C. App. 1978)*,, the Court in no uncertain terms held that once suit was commenced "before an equitable lien will be imposed, the employer or the employer's subrogee must "intervene and affirmatively assert a right to settlement proceeds." *WMATA v. Reid, 666 A.2d at 44.*

There, WMATA intervened in the third party action and argued because it had paid workers' compensation benefits, its employee should not be permitted to dismiss his suit against the third party or, alternatively, it should be assigned its employee's claim against the third party allowing it to proceed to trial on the merits.

The trial court dismissed the third party claim as advanced by WMATA's employee and concluded there was no basis for assignment since an "award in a compensation order" under *D.C. Code § 36-335(b)* had been issued in the case. *WMATA v. Reid, 666 A.d at 42*

On appeal, the judgment of the trial court was affirmed and it was held that in a claim asserted by a worker, the worker "has exclusive control of the action and in the absence of assignment or so called statutory lien, the subrogee's only recourse was an independent action against the third party tort-feasor, which is of no concern to Petitioner.

In the instant case, the Board found that Petitioner's client's third party claim was settled on February 7, 1991 and the third party to the suit was notified of an equitable lien on January 29, 1991. It was not until February 18, 1991 that the third party notified Petitioner of the assertion of a third party lien. Petitioner never received notice from the subrogee of a claimed lien until February 20, 1991 several weeks after the settlement had been consummated. *Appendix p. 63-64.*

As was observed in *Travelers Ins. Co. v. Haden, 418 A.2d 1078 (D.C. App. 1980)* as far as an attorney in such circumstances:

> Although the attorney received notice of the government's claim to reimbursement, he did not incur liability by distributing the settlement proceeds to his client. As the court stated, the government argument "flies in the face of one elementary lesson that every lawyer quickly learns: that he impliedly agrees turn a

> recovery, over to his client." Correspondence between the parties indicated that the attorney's refusal to reimburse the United States stemmed form a good faith, if a mistaken, belief that the government was not entitled to the funds, and that he had never been required by the government to assign any of his client's rights nor to disburse any funds.

Id. at 1085. It necessarily follows that to require Petitioner to account for the lien as a condition precedent to reinstatement to the Bar, where the third party bares sole responsibility, if any, flies in the face of reason and does not comport to fundamental standards of fairness.

CONCLUSION

In The Appellate Court's opinion differing standards prevail in application of doctrine of waiver to private

unsecured equitable interest and federal constitution guarantees.

WHEREFORE, Petitioner respectfully pray that a writ of certiorari be granted and judgment of The Appellate Court be **REVERSED**.

Respectfully submitted,

Gregory L.A. Thomas
613 Pennsylvania Avenue, S.E.
First Floor
Washington, D.C. 20003
202-347-1300

IN PROPER PERSON
(Pro Se)

APPENDIX

Notice. This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporter Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

District of Columbia Court of Appeals

No. 98-BG-713

IN RE: GREGORY L.A. THOMAS, RESPONDENT.

On Exceptions of Bar Counsel and Respondent to Report and Recommendation of Board on Professional Responsibility

(Argued March 19, 1999 Decided November 12, 1999)

Gregory L. A. Thomas, pro se.

Ross T Dicker, Assistant Bar Counsel, with whom Leonard H. Becker, Bar Counsel at the time the brief was filed, was on the brief, for the Office of Bar Counsel.

Elizabeth J. Branda, Executive Attorney, for the Board on Professional Responsibility.

Before STEADMAN and RUIZ, Associate Judges, and GALLAGHER, Senior Judge.

GALLAGHER, Senior Judge: The Board on Professional Responsibility ("the Board") recommended that respondent, Gregory L.A. Thomas, be disbarred. Attorney Thomas filed several exceptions to the Board's Report and Recommendation. Bar Counsel filed a limited exception contending the Board should have ordered restitution as a condition of reinstatement. We adopt the recommendation of the Board that Attorney Thomas be disbarred.

I. Facts

A. The Holmes Matter, Bar Docket No. 184-93

On July 20, 1989, Delores Holmes, while working for the American Federation of Teachers, slipped on a wet floor at the Washington Hilton Hotel ("Hilton") and suffered injuries. Holmes retained Gregory Thomas to represent her in a civil action for damages filed against Hilton. Attorney Thomas also filed a workers' compensation claim related to this incident on behalf of Holmes against her employer and its insurance carrier, INA.[3]

INA paid for some of Holmes' medical bills which related to her July 20th injury. Attorney Thomas negotiated with INA in an attempt to obtain a waiver of INA's statutory lien on any proceeds from the civil action against Hilton.

On January 29, 1991, while Attorney Thomas and Hilton were negotiating a settlement of the civil action, INA informed Hilton that INA had paid medical bills on behalf of

[3] INA is part of the CIGNA group of insurance companies. At times, the Committee referred to the company as CIGNA and CIGNA/INA. For simplicity, where possible, we will refer to the company as INA.

Holmes and was asserting its statutory lien on any settlement proceeds. Holmes reached a settlement with Hilton on February 7, 199 1, in the amount of $8,500. On February 14, 1991, Attorney Thomas prepared a "Settlement Statement," proposing to distribute the proceeds in the following fashion: $2,833.33 to Attorney Thomas as his contingency fee, $4,087 to pay Holmes' medical bills and reimburse the insurance companies, and $1,579.67 to Holmes. Holmes signed this document. On February 18, 1991, Hilton sent a letter to INA, with a copy to Attorney Thomas, informing INA that the settlement draft of $8,500 would be made payable to Holmes, Thomas, and INA as the "lienholder." On February 20, 1991, INA sent a letter to Attorney Thomas stating that the amount of the lien was $2,272.85.

On March 18, 1991, Holmes and INA settled the workers' compensation claim, with INA agreeing to pay Holmes' medical expenses, incurred through November 1989,

relating to her July 20th injury. INA confirmed the settlement and requested that Attorney Thomas submit all of Holmes' outstanding medical expenses. Attorney Thomas did not respond to this request. INA sent another letter to Attorney Thomas, confirming that Hilton agreed to recognize INA's lien of $2,272.85, and stating that the lien may be less depending on the amount of Holmes' unpaid medical bills through November 1989.

Attorney Thomas wrote a letter to Hilton objecting to the inclusion of INA as a payee on the settlement draft, suggesting Hilton issue a separate draft for INA. On April 2, 1991, Hilton issued a draft listing Holmes, Thomas, and INA as payees. Hilton responded to Attorney Thomas' letter, stating it was informed that INA had a "valid workmen's compensation lien in this matter." Meanwhile, INA continued its attempts to determine the amount of Holmes' unpaid

medical bills by requesting the information from Attorney Thomas.

Attorney Thomas received the settlement draft for $8,500 from Hilton. Both Thomas and Holmes endorsed the draft. INA, however, did not. Attorney Thomas deposited the draft in his clients' escrow account with the Industrial Bank of Washington ("Industrial Bank"). Attorney Thomas did not advise INA that he had received the draft, or that he had deposited the draft in the escrow account without INA endorsement. INA again requested information on Holmes' unpaid medical bills. Attorney Thomas did not respond.

On May 8, 199 1, Attorney Thomas' escrow account had a balance of $12,947.56. Subsequently, Attorney Thomas wrote checks to himself, his employee, and others. On July 18, 1991, the account had a balance of $103.55. Holmes, however, had not received from Attorney Thomas any disbursement of funds relating to her settlement with Hilton.

In 1992, Holmes retained another attorney, Mark Schaffer, to represent her in an unrelated workers' compensation claim against her employer involving carpal tunnel syndrome. Holmes expressed her concern to Attorney Schaffer over the status of her settlement with Hilton, and that she could not receive a satisfactory explanation from Attorney Thomas. Schaffer made repeated attempts to learn from Thomas about the settlement. Thomas offered no explanation to Schaffer. In May 1993, Holmes filed a complaint with the Bar concerning Attorney Thomas' handling of her settlement with Hilton.

Subsequently, on December 3, 1993, Attorney Thomas deposited $8,093 into his clients' escrow account, which raised the balance to $8,112.36. On December 6, 1993, Attorney Thomas sent to his client, Holmes, a "revised settlement statement," which proposed a distribution of the Hilton settlement funds that differed from the distribution

Thomas proposed on February 14, 1991. Under this new proposal, CIGNA/IA would receive $2,272.85 from the Hilton settlement. This correspondence was accompanied by a photocopy of a check from Thomas made payable to CIGNA/INA. But Attorney Thomas never actually forwarded the check to INA. Rather, he kept the money as his own attorney's fee in this matter.

The Board concluded that during this time, Attorney Thomas engaged in commingling of his personal funds with his clients' funds. In August 1991, Attorney Thomas received a settlement for a personal injury claim of his own and unrelated to his representation of Holmes. Attorney Thomas received a check for $8,822 from State Farm Insurance Company made payable solely to Thomas, and deposited it into his clients' escrow account.

Bar Counsel charged Attorney Thomas with six violations of the District of Columbia Rules of Professional

Conduct: commingling (Rule 1.15 (a)), misappropriation (Rule 1. 15 (b)), failing to notify a third party promptly of the receipt of funds in which the third party has an interest (Rule 1. 15 (b)), failing to keep client reasonably informed (Rule 1.4 (a)), engaging in acts of dishonesty (Rule 8.4 (c)), and engaging in conduct seriously interfering with the administration of justice (Rule 8.4 (d)). Bar Counsel chose not to pursue the latter violation of Rule 8.4 (d).

Hearing Committee Number Five ("the Committee") found Attorney Thomas had engaged in commingling and misappropriation, failed to keep his client reasonably informed, and had engaged in acts of dishonesty.[3] The Committee recommended disbarment. Attorney Thomas filed an exception to the Committee's Report and Recommendation. Bar Counsel filed a limited exception to

[3] The Committee found the evidence insufficient to establish that Thomas had failed to notify a third party of the receipt of settlement funds in which the third party had an interest.

the Committee's report, challenging the Committee's finding that the evidence was insufficient to show Attorney Thomas had failed to notify a third party of the receipt of funds in which it had an interest.

The Board issued its Report and Recommendation on May 7, 1998. The Board found that Attorney Thomas had engaged in misappropriation, commingling, and dishonesty, In addition, the Board found that Attorney Thomas had failed to keep his client reasonably informed, and had failed to notify a third party of the receipt of funds promptly. The Board concluded that IA did have a statutory lien, but that the exact amount of the lien was not clear.

The Board recommended disbarment. The Board further deferred the issue of whether Attorney Thomas should make restitution to IA until Thomas filed a petition for reinstatement because the exact amount of INA's lien was unclear.

B. The Davis Matter, Bar Docket No. 343-95

Attorney Thomas represented Sheila Davis in a dispute with New York Life Insurance Company over a policy insuring the life of Davis' fiancé'. Attorney Thomas negotiated a settlement with New York Life in the amount of $ 10,000. The settlement draft was deposited in the Thomas client escrow account on March 24, 1995. By agreement between Thomas and Davis, the settlement proceeds were shared equally.

New York Life then agreed to refund to Davis the insurance premium of $614.64. Davis agreed that Attorney Thomas would receive $294.88 from this settlement as his fee.

Attorney Thomas received a draft from New York Life for $614.64, made payable to himself and Davis. Attorney Thomas cashed the draft, kept $200 in cash, and deposited $409.76 in his clients' escrow account. Attorney Thomas gave

Davis $100 in cash as an advance on the amount due to her. However, Attorney Thomas did not formalize this arrangement.

On September 7, 1995, Attorney Thomas gave Davis a check for $409.76. While visiting her family in California, Davis asked her son-in-law to cash her check at his bank. Attorney Thomas, however, had previously drawn four checks on his escrow account made payable to himself As a result, the escrow account balance fell to $348.45. When the check to Davis was presented to Industrial Bank, it was honored. Attorney Thomas' clients' escrow account, however, dropped to a negative balance of $61.31. Attorney Thomas deposited $100 in his clients' escrow account on September 18, 1995.

Hearing Committee Number Seven found a violation of D.C. Bar R. XI, § 19 (f), and Rule 1.15 (a). The Committee concluded, however, that there was insufficient evidence to find an intentional or reckless misappropriation. The Board

concurred with the Committee's findings. The Davis matter was then consolidated with the Holmes matter.

C. Consolidated Matters

The Board concluded that if the Davis matter "were the sole violation committed by Respondent' it would "likely carry a sanction of less than suspension." "But because it occurred after the conduct in the first [Holmes] matter had been brought to Bar Counsel's and Respondent's attention, a more severe sanction may have been warranted." (Citations omitted.) The Board recommended disbarment on the basis of both matters. Neither Bar Counsel nor Attorney Thomas filed an exception with respect to the Davis matter. Both Attorney Thomas and Bar Counsel filed exceptions to the Board's Report and Recommendation concerning the Holmes matter.

II. Standard of Review

When no exception has been filed with this court concerning the Board's recommendation, we will accept that

recommendation. D.C. Bar R. XI, § 9 (g)(2); In re Delaney, 697 A.2d 1212, 1214 (D.C. 1997). In this instance, no exception has been filed with respect to the Davis matter. We therefore accept the recommendation of the Board that because the conduct occurred after the Holmes matter had been brought to Bar Counsel's attention, a more severe sanction is warranted.

Both Attorney Thomas and Bar Counsel have filed exceptions to the Board's Report and Recommendation with respect to the Holmes matter. When an exception has been filed to the Report and Recommendation by the Board, we accept the Board's findings of fact in the report "unless they are unsupported by substantial evidence of record." D.C. Bar R. XI, § 9 (g)(1); In re Clarke, 684 A.2d 1276, 1280 (D.C. 1996). Further, we will adopt the recommendation of the Board, 11 unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would

otherwise be unwarranted." D.C. Bar R. XI, § 9 (g)(1). We turn now to the exceptions to the Board's Report on the Holmes matter.

III. Attorney Thomas' Exceptions

We initially turn to the exceptions noted by Attorney Thomas. Thomas first contends that INA failed to perfect its lien against Holmes' settlement with Hilton and that Thomas had no duty to notify INA of his receipt of the settlement draft from Hilton.

The Board concluded, however, that the evidence was "clear and convincing that INA had a statutory lien of some amount." Further, an attorney may not withdraw funds deposited in a client escrow account where the attorney's right to receive the funds is in dispute. See In re Haar, 667 A.2d 1350, 1353 (D.C. 1995) (holding attorney may not withdraw legal fees from client account when client disputes attorney's right to receive the fees). Indeed, an attorney has a duty to

protect the property of third parties in the attorney's custody. See D.C. Rules of Professional Conduct 1.15, 1.15, cmt. [4]. In this instance, INA asserted its right to a statutory lien against Holmes' settlement with Hilton. Attorney Thomas, however, contended that INA had waived its lien. Accordingly, Attorney Thomas' right to receive the funds was in dispute. Thomas should not have withdrawn funds from the account while INA right to those funds was in dispute.

Attorney Thomas next contends that there was no evidence of scienter to sustain a finding that he acted dishonestly in representing to Holmes that he had satisfied INA lien. Knowledge, however, may be inferred from the attorney's conduct. See In re James, 452 A.2d 163, 166 (D.C. 1982). Here, Attorney Thomas sent Holmes a letter dated December 9, 1993 that included a "revised settlement sheet," and a photocopy of a check from the escrow account made payable to INA. Attorney Thomas never sent this check to

INA, the payee. While he contends that his delivery of the copy of the check to Holmes was unintentional, the Board "is not required to accept his version of events." Id. Because both the Committee and the Board discredited Attorney Thomas' testimony, we accept the Boards conclusion that Thomas committed an act of dishonesty.

We now turn to Attorney Thomas' contention that Holmes "was well informed as to the status of her case." Attorney Thomas claims that between February 14, 1991 and July 31, 1992, he had four meetings with Holmes in person, and at least two telephone conversations. He claims that he kept Holmes informed through these contacts.

The quantity of contacts between the attorney and the client, however, is of little importance when the attorney provides sparse or misleading information to the client. Specifically, the Board found "Respondent misled Holmes into thinking that her money was in his escrow account and

then stopped providing her with information altogether." In giving such misleading information, then, he failed to keep Holmes correctly informed.

Attorney Thomas next contends that the Board independently determined that he had "intentionally misappropriated settlement proceeds as opposed to simple misappropriation as so found by Committee Five." A violation of Rule 1. 15 (b) occurs whenever the balance in the client escrow account falls below the amount due to the client. In re Micheel, 610 A.2d 231, 233 (D.C. 1992). Here, the evidence clearly showed that the balance of the client escrow account fell below the amount due to Holmes.

"[I]n virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence." In re Addams, 579 A.2d 190, 191 (D.C. 1990) (en banc). In his brief, Attorney Thomas quotes the

recommendation of the Committee, which states, "This is misappropriation, plain and simple." By selecting this one quote completely out of context, Attorney Thomas would have this court agree that the Committee did not find intentional misappropriation. However, the Committee clearly found that Attorney Thomas' actions were intentional and fraudulent:

> The misappropriation shown here was not the product of simple negligence, and no such claim is made by respondent. . . . Thomas used his client's funds without her knowledge or permission, lied to her and Bar Counsel about it and tried to cover it up with fraud, including fraudulently fabricated documents. . . . The cross examination of Respondent reveals that, on occasions too numerous to specify, Respondent's testimony was largely fabricated.

The evidence is clear, then, that Attorney Thomas committed an intentional misappropriation of client funds.

Next, Attorney Thomas challenges the Board's conclusion that he engaged in commingling of funds. Specifically, Attorney Thomas argues that because some unspecified parties other than Thomas had an interest in his own personal injury settlement, he was bound to deposit the settlement in his clients' escrow account.

The check from State Farm that Attorney Thomas deposited into the client escrow account, however, identified solely Thomas as the payee. It represented Attorney Thomas' personal funds. When Attorney Thomas deposited it into his client escrow account, his personal funds and those of his clients became intermingled so that their separate identity was lost. See In re Hessler, 549 A.2d 700, 707 (D.C. 1988). We, therefore, accept the Board' s conclusion that commingling occurred.

Attorney Thomas further contends that there was a complete lack of evidence to establish that he had failed to keep complete records of his clients' accounts. This finding of fact, however, was made by the Committee. Attorney Thomas failed to file an exception to this finding with the Board. Therefore, he has waived his right to pursue it before this court. See In re Ray, 675 A.2d 1381, 1386 n.5 (D.C. 1996); In. re Williams, 464 A.2d 115, 118 (D.C. 1983).

Finally, Attorney Thomas challenges the issuance of subpoenas duces tecum upon Industrial Bank within an eighteen month period. Attorney Thomas contends: (1) Bar Counsel failed to follow Super Ct. Civ. R. 5 & 6; (2) Bar Counsel required Industrial Bank to produce documentation about his account which violated the Fifth Amendment; and (3) Bar Counsel was motivated out of vindictiveness.

First, we note that Bar Counsel's subpoena power is subject to the civil rules, see D.C. Bar R. XI, see. 18, which

provide that a party to civil litigation is to be given notice of "any commanded production of documents," see Super. Ct. Civ. R. 45(b)(1).[3]

Thomas, however, did not raise before the Board the question of how the civil rules are to apply to Bar Counsel proceedings. We, therefore, consider the issue waived, and decline to address it. See In re Huber, 708 A.2d 259, 261 (D.C. 1998)In re Clarke, 684 A.2d 1276, 1280 (D.C. 1996); In re James, 452 A.2d 163, 168-69 (D.C. 1982).

Next, we address whether the issuance of the subpoenas duces tecum violated the Fifth Amendment. The Supreme Court has held "a party incriminated by evidence produced by a third party sustains no violation of his own Fifth Amendment rights." California Bankers Ass'n v. Shultz, 416 U.S. 21, 55 (1974) (citing Couch v. United States, 409

In the civil context, this has been interpreted to include notice of subpoenas to third parties. See, e.g., Okubo v. Reynolds, 16 F.3d 1016, 1020 n.4 (9th Cir. 1994) (interpreting identical language in federal rule).

U.S. 322, 328 (1973); Johnson v. United States, 228 U.S. 457, 458 (1913)). The records in question were produced by the bank, and not by Attorney Thomas. Therefore, we perceive no Fifth Amendment violation.

Finally, we address the issue of whether Bar Counsel was motivated out of vindictiveness. Attorney Thomas claims that because he represented Ronald Ray in an unrelated disciplinary case, see In re Ray, 675 A.2d 1381 (D.C. 1996), Bar Counsel harbored an improper animus requiring dismissal of the charges against him. See United States v. Mangieri, 224 U.S. App. D.C. 295, 298, 694 F.2d 1270, 1273 (1982) (discussing the standards for a defense of selective prosecution).

The Board addressed this argument, and found no merit to it:

> There is absolutely no credible evidence to support Respondent's theory that this

investigation was launched because the Assistant Bar Counsel was biased against him.... The only basis for Respondent's claim of Assistant Bar Counsel's vindictiveness is his own characterization that his defense of Mr. Ray was "successful." This characterization, however, is greatly overstated as Mr. Ray was suspended from the practice of law for six months and ordered to make restitution.... Moreover, it is implausible that such an event would trigger any animosity in an Assistant Bar Counsel. These attorneys handle scores of cases each year, and not infrequently the result obtained is not the same as the result sought. Indeed, the most that Respondent has shown is that his defense of Mr. Ray and the investigation of himself stemming from Ms.

> Holmes' complaint occurred over the same general time frame and involved the same Assistant Bar Counsel.

We agree with this finding of the Board, and conclude that the contention is frivolous.

IV. Bar Counsel's Exceptions

Next, we focus on the exceptions filed by Bar Counsel. Bar Counsel claims the Board erred in failing to order Attorney Thomas to make full restitution to INA as a condition of reinstatement. A reading of the Board's recommendation reveals that the Board deferred the issue of restitution until Attorney Thomas seeks reinstatement. The Board's recommendation states:

> Finally, we note the Respondent [Thomas] has never paid CIGNA/IA the $2,272.85 statutory lien. Under most circumstances, we would recommend that Respondent make restitution

> of misappropriated funds pursuant to Rule XI, § 3 (b). Since there is some issue as to the exact amount of the lien, we decline to recommend restitution but note that should Respondent ever seek reinstatement, he will have to address this $2,272.85 statutory hen and what he did to satisfy it. See in re Robinson, 705 A.2d 687 (D.C. 1998); In re Roundtree, 503 A.2d 1215 (D.C. 1985).

This court has adopted recommendations of the Board to defer the issue of restitution until the filing of a petition of reinstatement based on the "unsatisfactory state of the record." In re Lewis, 689 A.2d 561, 567 (D.C. 1997). See also In re Morrell, 684 A.2d 361, 372 n.5 (D.C. 1996). We are bound, however, by the Board's findings of fact, and must "enter an appropriate order." See D.C. Bar R. XI, § 9 (g). In

this instance the Board concluded that IA did have a legal right to payment:

> The evidence is clear and convincing that IA had a statutory lion of some amount, probably $2,272.85, and that Respondent never made any attempt to notify IA of the receipt of these funds . . . . . To the extent there was any ambiguity in connection with this lien, it was only as to its exact amount, but not as to its existence.

In workers' compensation cases, for the statutory lien to apply, the claimant must have been awarded benefits under a compensation order filed with the Mayor. DC Code § 36-335 (b) (1997 Rep.). In this instance, Holm's never received benefits under a workers' compensation order. Rather, the workers' compensation claim was settled before a hearing was held.

Nonetheless, our law recognizes that a workers' compensation insurer has an equitable lien on the recovery from a third party tort-feasor. See Washington Metro. Area Transit Auto. v. Rid, 666 A.2d 41, 44 (D.C. 1995); Travelers Ins. Co. v. Haden, 418 A.2d 1078, 1081 (D.C. 1980). "The insurer is subrogated to the 'employer's implied right of reimbursement out of an employee's third party recovery.'" Haden, supra, 418 A.2d at 1081 (quoting Petition of Sheffield Tankers Corp., 222 F.Supp. 441, 443 (N.D.Cal. 1963)). The insurer protects this subrogation right either through direct intervention in the third party tort action, or by notification to the third party. Id.

Here, the Hearing Committee concluded that there was support in the record that the settlement of the workers' compensation claim involved a waiver of the insurer's statutory lien, and that therefore INA's entitlement to a lien against the settlement proceeds from Hilton was not

established by clear and convincing evidence. A waiver, however, is the unilateral, voluntary and intentional relinquishment of a known right. See Embassy of Benin v. District of Columbia Bd. of Zoning Adjustment, 534 A. 2d 310, 3 23 (D.C. 1987); Bailey v. Greenberg, 516 A.2d 934, 93 9 n.5 (D.C. 1986). See also Government Employees Ins. Co. v. Group Hospitalization Medical Servs., Inc., 589 A.2d 464, 466 (Md. 199 1). A waiver can involve conduct that "warrants an inference of the relinquishment of such right." Food Fair v. Blumberg, 200 A.2d 166,176 (Md. 1964).

There is a factual issue in this case concerning waiver of INA claimed statutory lien against the settlement proceeds from Hilton. The existence and amount of the lien need not be resolved at this time. Restitution of any amount which is to be owed by Thomas to IA is a factor that should be considered in Thomas' reinstatement petition.

V. Conclusion

We approve the recommendations of the Board.

The respondent, Gregory L.A. Thomas, is hereby disbarred from the practice of law in the District of Columbia, effective thirty days from the date of this opinion. The determination as to whether restitution is owed should be deferred until Mr. Thomas files a petition for reinstatement.

So ordered.

DISTRICT OF COLUMBIA COURT OF APPEALS

BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:

GREGORY L. A. THOMAS Bar Docket Nos. 184-93 & 343-95

Respondent.

Bar Docket Nos. 184-93 & 343-95

REPORT AND RECOMMENDATION OF THE

BOARD ON PROFESSIONAL RESPONSIBILITY

This Report consolidates two cases against Respondent Gregory L. A. Thomas, Bar Docket Nos. 184-93 and 343-95 which, by coincidence, came before the Board at the same approximate time.

I. DOCKET NO. 184-93

In this matter, Respondent was charged by Bar Counsel with six disciplinary violations:

Rule 1. 15(a), commingling;

Rule 1. 15(b), misappropriation (two separate instances);

Rule 1.15(b), failing to notify promptly a third party of the receipt of funds in which the third party had an interest and/or failing to promptly deliver funds to a third party entitled to receive them;

Rule 1.4(a), failing to keep his client reasonably informed and/or failing to comply promptly with requests for information;

Rule 8.4(c), engaging in acts of dishonesty; and

Rule 8.4(d), engaging in conduct which seriously interfered with the administration of justice.

Following a hearing on the above charges, Hearing Committee Number Five sustained four of the first five violations listed above,[3] including the charge of intentional

---

Bar Counsel, in its post-hearing brief, announced that it had elected not to pursue the Rule 8.4 violation, which charged that Respondent engaged in conduct which seriously interfered with the administration of justice. See Bar Counsel's Proposed Findings of Fact, Conclusions of Law and Recommendation as to Sanction, p. 15. Nothwithstanding Bar Counsel's position, this violation is discussed in the concurring opinion of Paul Knight.

misappropriation of his client's funds, and recommended the sanction of disbarment. Respondent filed an exception to the Hearing Committee's Report and Recommendation. Bar Counsel filed a limited exception to Hearing Committee's findings of fact and conclusions of law as they related to the Hearing Committee's determination that the evidence was insufficient to establish the second misappropriation charge that Respondent failed to promptly notify a third party of the receipt of settlement funds in which that third party had an interest.

The Underlying Facts

On July 20, 1989, Delores Holmes suffered injuries when she slipped on a wet floor at the Washington Hilton Hotel. She retained Respondent who filed a civil action styled Delores 1. Holmes v. Hilton Hotels Corp., C.A. No. 90-7707 in the Superior Court of the District of Columbia in July 1990. Because Ms. Holmes was working for her employer,

the American Federation of Teachers, at the time of her injury, she also filed a worker's compensation claim against her employer and its insurance carrier, the Insurance Company of North America ("INA").[3]

In the civil action, the Hilton Hotels Corp. ("Hilton") and Ms. Holmes, with Respondent as her counsel, agreed to settle the case on February 7, 1991 for $8,500. On February 14, 1991, Respondent prepared and Ms. Holmes signed a "Settlement Statement" that set forth a proposed distribution of the $8,500: $2,833.33 to Respondent as his legal fee on a one-third contingency basis; $4,087.00 to Ms. Holmes' medical providers and insurers, and the balance of $1,579.67 to Ms. Holmes.

Prior to settling the case with Hilton, Respondent had also been in settlement discussions with Douglas Seymour,

[3] The worker's compensation insurance company INA is part of the "CIGNA companies" group and from time to time is also referred to by the Hearing Committee and parties as CIGNA or CIGNA/INA.

Esquire, an attorney for INA, the worker's compensation insurer for Ms. Holmes' employer. In these discussions, Respondent sought to have INA waive its statutory lien rights with respect to recouping Ms. Holmes' medical bills, which were part of her personal injury claim against Hilton. No agreement, however, was reached between Respondent and INA prior to Ms. Holmes' agreement to settle with Hilton.

On January 29, 1991, Mr. Seymour informed counsel for Hilton that the insurance carrier (INA) had paid medical bills on behalf of Ms. Holmes and was asserting a statutory lien on the settlement proceeds in order to obtain reimbursement. On February 18, 1991 (after Hilton and

Ms. Holmes' had agreed on the settlement amount), Hilton's counsel sent a letter to Mr. Seymour, with a copy to Respondent, advising that the settlement draft of $8,500.00 would be made payable to three parties, including INA as the "lienholder." On approximately February 20, 1991, the

CIGNA/INA sent a notice to Respondent advising that the amount of the lien was $2,272.85 and that its lien should be satisfied before any third party settlement was distributed.

Ms. Holmes' worker's compensation hearing was scheduled for March 19, 1991. On March 18, 1991, the parties reached a settlement which was confirmed in a letter from Mr. Seymour to Respondent dated March 20, 1991. In that letter, INA agreed to pay

Ms. Holmes' medical expenses related to her July 20, 1989 injury through November 1989[3] and requested Respondent to submit all medical expenses for Ms. Holmes that were still outstanding for the period through November 1989. Respondent did not respond to INA's March 20th request.

In a letter dated February 28, 1991, Mr. Seymour offered to settle the worker's compensation case with the insurer paying all of Ms. Holmes' medical expenses in that matter. However, in the March 20, 1991 letter to Respondent confirming the agreed-upon settlement, INA agreed to pay only her medical bills through November 1989.

On March 27, 1991, Seymour sent another letter to Respondent to confirm that Hilton had agreed to recognize INA's lien of $2,272.85 and to advise Respondent that the final amount of the lien might be less depending on the amount of unpaid medical bills that Ms. Holmes had incurred prior to the end of November 1989. Seymour again requested Respondent to provide him with any unpaid bills so that they could be paid by the insurance company. Respondent again did not respond to Mr. Seymour.

On March 29, 1991, Respondent wrote to counsel for Hilton demanding full payment of the settlement amount. Respondent added that if Hilton felt "compelled" to take steps to protect the statutory lien of INA, Hilton should issue a separate draft for the claimed amount to INA. Respondent objected to INA appearing as a payee on the settlement draft sent to him.

On April 2, 1991, Hilton issued the settlement draft with three payees: Respondent, Ms. Holmes, and INA. Hilton's counsel sent a cover letter to Respondent explaining that INA was added as a payee after Hilton was informed it held a "valid workmen's compensation lien in this matter." Respondent did not make any reply to this letter.

On April 8, 1991, Mr. Seymour wrote to Respondent again requesting a copy of Ms. Holmes' outstanding medical bills to determine the exact amount of its lien. Respondent did not respond to this request. He also did not advise Seymour that the settlement draft made payable in part to Seymour's client INA had been received.

On May 8, 1991, Respondent deposited the $8,500 settlement draft into his non-IOLTA escrow account at the Industrial Bank of Washington. The check was endorsed by Respondent and Ms. Holmes, but not by a representative of INA. On May 17, 1991, Seymour again wrote Respondent,

asking him to provide a list of Ms. Holmes' outstanding medical expenses and advising that he (Seymour) was aware that Hilton had forwarded to Respondent the settlement draft which required the insurance carrier's endorsement. Respondent did not provide any answer to this request for information about outstanding medical bills nor did he advise Seymour that he had already deposited the settlement draft into his escrow account.

With the deposit of the Holmes on May 8, 1991, the escrow account's balance was $12,947.56. Thereafter, Respondent wrote checks to himself, to his employee, and to others. By July 18, 1991, the account's balance was down to $103.55. No funds were disbursed as of July 18, 1991 to Ms. Holmes or any of the medical providers or insurance companies listed on Respondent's February 14, 1991 settlement statement which had been signed by Ms. Holmes.

Initially Respondent told Ms. Holmes that he had to maintain the settlement proceeds in his escrow account pending an "appeal" he filed in the worker's compensation case.[3] Respondent never told her that he could not distribute her share to her because he had used her funds and there were insufficient funds in his account. Between July 31, 1991 and December 1993, there were numerous occasions when the account had balances which ranged from the negative to under $100. Ms. Holmes believed that her settlement funds

---

The record indicates that on July 15, 1991, three and one-half months after he received the $8,500 settlement draft, Respondent filed on behalf of Ms. Holmes an "Application for Review" in Ms. Holmes' worker's compensation case. As grounds, Respondent stated that the settlement had fallen through and that Ms. Holmes now wanted a hearing on the merits. After the filing of this application, there is no clear evidence as to what happened; it appears the worker's compensation case just stalled. As a result of Ms. Holmes lodging a complaint with Bar Counsel in May 1993, Respondent moved to withdraw from the worker's compensation case in November or December 1993.

were to remain in escrow until the "appeal" was decided -- which was the same explanation which Respondent made in his initial response to Bar Counsel. Respondent did not have the consent or authorization of Ms. Holmes or of INA to use the Holmes settlement funds to pay himself, his employee, and other parties not related to the Holmes matter.

On August 8, 1991, Respondent deposited a check for $8,822.00 drawn on the State Farm Mutual Insurance Company and payable to himself into his escrow account. This money was a personal injury settlement for injuries sustained by Respondent himself in an accident and were his personal funds.

In mid-1992, Ms. Holmes retained attorney Mark Schaffer to represent her on an unrelated worker's compensation claim involving carpal tunnel syndrome. Holmes expressed concern to Schaffer that she did not know the status of her Hilton settlement proceeds and could not

obtain a satisfactory explanation concerning that matter from Respondent.

In October 1992, Schaffer wrote to Respondent inquiring about the status of the Hilton funds. Respondent did not answer this letter. On November 16, 1902 Schaffer wrote a second letter asking for the settlement proceeds and further requesting supporting documentation. Respondent called Schaffer on November 30, 1992 and promised a follow-up letter with an explanation. When no such letter appeared, Schaffer sent a third letter requesting the promised explanation and advising that Ms. Holmes was anxious to learn the status of her case. Respondent never answered.

In May 1993, Ms. Holmes filed a complaint with the Bar. In his July 14, 1993 response to Bar Counsel, Respondent attributed the delay in distributing the settlement funds to the pending lien by INA. However, during the period July 30, 1993 through October 29, 1993, the account balance

on Respondent's escrow account in question ranged from a high of $742.85 to a low of minus $12.36.

On October 26, 1992, Bar Counsel requested Respondent to provide within 10 days all records showing how the settlement funds were handled. At that time the balance in Respondent's escrow account was $2.28. After receiving no response to his October 26, 1993 letter, Bar Counsel renewed his request on November 16, 1993 for documents, to be provided within 7 days. On November 23, 1993 Respondent provided the May 8, 1991 deposit ticket of $8,500.00, and stated that "more records will follow in a few days." On December 1, 1993, the balance in Respondent's escrow account was $19.36.

On December 3, 1993, Respondent deposited $8,093.00 into his escrow account, raising the balance to $8,112.36. On December 6, 1993, Respondent sent Ms.

Holmes a "revised" settlement statement in which Respondent purported to distribute the $8,500.00 as follows:

Dr. Hill $ 210.00

Dr. Goltz $ 472.50

Cigna (INA) $ 2,272.85

Ms. Holmes $ 5,544.65

The revised distribution statement did not identify any amount for his attorney's fee. In addition, $2,590.00 due to Blue Cross/Blue Shield was noted but not provided for. Accompanying this "revised" settlement statement were original checks to Holmes in the amounts of $5,544.65. and $350.00,[3] and copies of checks made payable to Dr. Goltz, Dr. Hill and CIGNA/INA in the aforementioned amounts. Copies of the revised statement and attached checks were sent to Bar Counsel.

The check for $350.00 carried the notation "Return of Suit Money for advanced costs i No. 90-CA07107."

Respondent, however, did not inform either Ms. Holmes or Bar Counsel that he never forwarded his check made payable to CIGNA/INA to the insurance company, but kept those funds as his attorney's fee.

Hearing Committee's Findings As To Credibility

Respondent claimed that Ms. Holmes owed him $4,100 for unpaid legal services he had previously performed for her and further, that Ms. Holmes had agreed to lend him $1,500 for his use in defraying expenses in his daughter's medical malpractice claim.

Ms. Holmes denied ever seeing, much less agreeing to pay, bills from Respondent reflecting $4,100 for legal services relating to effecting a name change on her birth certificate in 1987. Ms. Holmes' testified that she paid all bills relating to her name change in full and denied ever agreeing to lend Respondent any of her settlement proceeds.

The Hearing Committee found Respondent's testimony "to be wholly unworthy of credence and an after-the-fact concoction." (Hearing Committee Report at 10.) We fully credit the findings of the Hearing Committee which heard the testimony of Ms. Holmes and Respondent and was able to observe each witness' demeanor and judge their candor. See In re Micheel, 610 A.2d 231, 234 (D.C. 1992).

Discussion of Legal Objections/Defenses

A. Bar Counsel's Subpoena Duces Tecum Upon Respondent's Bank Was Properly and Lawfully Issued

Respondent initially argues that the investigation underlying this proceeding, which included the issuance of subpoenas to his bank for records of his escrow account, was commenced because Respondent, while representing attorney Ronald Ray in an unrelated disciplinary proceeding, greatly angered an Assistant Bar Counsel after Respondent thwarted that Assistant Bar Counsel's efforts to disbar Mr. Ray. See In

re Ray, 675 A.2d 1381 (D.C. 1996). Respondent claims that this Assistant Bar Counsel, because of the purported setback dealt in the Ray matter, harbored such animosity towards him as to launch an investigation into Respondent's financial activities.

There is absolutely no credible evidence to support Respondent's theory that this investigation was launched because the Assistant Bar Counsel was biased against him. See generally In re Stanback, 681 A.2d 1109 (D.C. 1996) (insufficient showing of bias on part of Hearing Committee chair and lay member); In re Williams, 693 A.2d 327 (D.C. 1997) (insufficient evidence of claim of racially discriminatory discipline). The only basis for Respondent's claim of Assistant Bar Counsel's vindictiveness is his own characterization that his defense of Mr. Ray was "successful." This characterization, however, is greatly overstated as Mr. Ray was suspended. from the practice of law for six months

and ordered to make restitution. 675 A.2d at 1381. Moreover, it is implausible that such an event would trigger any animosity in an Assistant Bar Counsel. These attorneys handle scores of cases each year, and not infrequently the result obtained is not the same as the result sought. In deed, the most that Respondent has shown is that his defense of Mr. Ray and the investigation of himself stemming from Ms. Holmes' complaint occurred over the same general time frame and involved the same Assistant Bar Counsel.

In addition, the record clearly shows that the investigation of Respondent was started when Ms. Holmes lodged her complaint concerning her inability to obtain information relative to her $8,500 settlement check. This complaint was referred to the Office of Bar Counsel who properly conducted an investigation. After reviewing the entire record, it appears that the claim of improper animus on the part of Assistant Bar Counsel is being raised primarily to

serve as a distraction from the fact that Respondent used all the settlement proceeds in the Holmes' matter for his own purposes.

B. Respondent Was Not Denied

Due Process Under Rule XI

Respondent's contention that he was denied due process under Rule XI of the Rules Governing the Bar as the result of Bar Counsel issuing a subpoena for his bank records when there was allegedly no reasonable basis to suspect that a rule infraction had occurred is both legally and factually incorrect. In the first place, Bar Counsel had a reasonable basis to suspect a rule infraction had occurred based on the complaint of Ms. Holmes which asserted she did not know what had become of her settlement funds.. This suspicion ripened into probable cause and more when Respondent failed to provide a full and clear explanation in response to Bar Counsel's inquiry as to what had become of the settlement

proceeds. The conversion of settlement funds belonging to a client, if true, would clearly warrant discipline and it was proper for Bar Counsel to investigate this possible violation thoroughly. See Rule XI, §6(a)(2). Thus, Respondent was afforded all the due process to which he was entitled.

C. The Hearing Committee Did

Not Receive Tainted Evidence

Respondent's claim that the bank records obtained by subpoena duces tecum were tainted because they were obtained in violation of his Fifth Amendment right against self-incrimination is wholly misplaced. It is well-established that the Fifth Amendment's privilege against self-incrimination does not extend to the production of an individual's bank records from his bank. See Doe v. United States, 487 US 201, 218-19 (1988); Fish v. United States, 425 US 391, 411 (1976). Neither the bank records nor the ensuing investigation were in any fashion tainted.

D. Respondent Did Not Suffer

Prejudicial Delay

Respondent claims prejudicial delay, but he has entirely failed to articulate any prejudice suffered during the time period while the Hearing Committee was writing its report and recommendation. In the absence of any showing of prejudice, any delay is of no consequence to the outcome of a disciplinary proceeding. In re Morrell, 684 A.2d 361 (D.C. 1996); In re Williams, 513 A.2d 793 (D.C. 1986) (per curiam).

Conclusions As To Violations

Misappropriation. We agree with the Hearing Committee that the evidence of misappropriation of Ms. Holmes' funds in violation of Rule 1.15(b) is overwhelming and unrefuted. Misappropriation is "any unauthorized use by an attorney of ... funds .entrusted to him or her, whether or not temporary or for personal gain or benefit." In re

Choroszej, 624 A.2d 434, 436 (D.C. 1992). Violation of the rule is complete when the balance in [the trust] account falls below the amount due to the client." In re Micheel, 610 A.2d at 233. The misappropriation here was complete within two months after Respondent received the proceeds of the Holmes settlement with Hilton Hotels.

Respondent's only defense to this charge was that he believed he was authorized to use Ms. Holmes' funds. There is nothing in the record to support this belief. Moreover, the Hearing Committee determined that Respondent was not credible when he made this claim.

Commingling. It was clearly established by unrefuted evidence that in August 1991, Respondent deposited the proceeds of his own personal injury case into his escrow account, thereby commingling client and personal funds. In re Velasquez, 507 A.2d 145, 148

(D.C. 1986). The evidence is clear and convincing that Respondent commingled funds in violation of Rule 1. 15(a).

Dishonesty. The record clearly demonstrates that Respondent misrepresented his handling of his client's settlement funds in December 1993 when he provided a copy of a check drawn to CIGNA/INA to imply that he had paid the insurance company when in fact he had not paid this amount. Respondent further perpetrated this dishonesty when he submitted this same false evidence to Bar Counsel.

Failure to Keep the Client Reasonably Informed. The evidence established by clear and convincing evidence that Respondent failed to keep Ms. Holmes reasonably informed about the status of her settlement funds and failed to respond to reasonable requests for information. Respondent misled Holmes into thinking that her money was in his escrow account and then stopped providing her with information altogether. When Ms. Holmes asked another attorney to find

out about the status of her funds, Respondent refused to respond to him either.

Failure to Promptly Notify Third Party of Receipt of Funds or Failure to Promptly Deliver Funds (Misappropriation). The Hearing Committee did not find clear and convincing evidence of this violation as it felt there was some "ambiguity" as to whether INA had waived its lien in settling the worker's compensation claim. Hearing Committee Report at 11. Bar Counsel has filed a limited exception to this finding. Upon review of this matter, we conclude that the evidence does establish a violation of Rule 1.5 (b) by clear and convincing evidence -- at least as to the requirement of the rule imposing a duty on a lawyer to promptly notify a third party upon receipt of funds in which the third party has an interest. The evidence is clear and convincing that INA had a statutory lien of some amount, probably $2,272.85, and that Respondent never made any

attempt to notify INA of the receipt of these funds. Hilton's settlement check required the endorsement of a representative of INA, yet Respondent ignored this and deposited the check into his escrow account.

To the extent there was any ambiguity in connection with this lien, it was only as to its exact amount, but not as to its existence. Clearly INA had served notice that it believed its lien to be $2,272.85 and that payment in this amount was required unless Respondent presented evidence that it should be a lesser amount. Respondent did not then, and has not now, presented any evidence that $2,272.85 is not the correct amount of the lien.

Even if Respondent contested the amount owed to INA, there was still a duty to promptly notify the third party lienholder of the receipt of funds and not to disperse such funds until the controversy was resolved. See Rule 1.15(c); In re Haar, 667 A.2d 1350 (D.C. 1995). (Haar 1).

II. DOCKET NO. 343-95

In this matter, Respondent was charged by Bar Counsel with violating Rule 1.15(a) of the Rules of Professional Conduct by failing to safekeep a client's property in his possession in connection with a representation (intentional or reckless misappropriation) and with violating both Rule XI, §19(f) of the Court of Appeals' Rules Governing the Bar and Rule 1.15(a) by failing to keep complete records of his handling and disposition of funds belonging to another person. Hearing Committee Number Seven sustained only the latter charge and recommended an informal admonition.[3]

The Underlying Facts

While the events in this matter occurred well after the events in Docket No. 184-93, Hearing Committee Number Seven issued its Report and Recommendation several months prior to the issuance of the Report and Recommendation of Hearing Committee Number Five.

The charges against Respondent stem from his representation of Sheila Davis in a dispute with New York Life Insurance Company which had issued a policy to Ms. Davis insuring the life of her fiancé. Respondent negotiated a settlement and New York Life issued an insurance draft in the amount of $ 10,000, payable to Respondent and Ms. Davis. That draft was deposited into Respondent's escrow account at Industrial Bank, N.A. on March 24, 1995. By agreement between Respondent and Ms. Davis, the proceeds were shared equally. In his escrow account check to Ms. Davis (No. 900), Respondent noted on the memo line: "Davis v. ./case 94-16448." No aspect of this transaction is questioned by Bar Counsel.

Subsequently, New York Life agreed to refund to Ms. Davis her insurance premium of $614.64. On August 28, 1995, Respondent prepared, and Ms. Davis signed, a settlement sheet reflecting that Respondent was to receive

one-third ($204.88) as his fee and Ms. Davis was to receive the remainder -- $409.76.

On September 1, 1995, Respondent received the insurance draft for $614.64, which was payable to himself and Ms. Davis. On September 5, 1995, Respondent cashed the insurance draft, directing that $414.64 be deposited in his escrow account, and taking $200.00 in cash. Respondent gave Ms. Davis $100.00 in cash in the nature of an advance on her share of the settlement. jr. 94). No document was prepared formalizing this arrangement.

On September 7, 1995, Respondent issued a check (No. 923) to Ms. Davis for the full amount due under the August 28, 1995 agreement, namely $409.76. Respondent again annotated his check on the memo line: "Davis v. N.Y. Life - #0785636." (BX 16).

Ms. Davis did not deposit the check locally but carried it to California where she went to visit family. While in

California, she ran low on funds and had her son-in-law help her cash this check at his bank.

Between September 5 and 13, Respondent drew four checks on his escrow account totalling $90-00. All four checks were payable to himself; none of the checks contained any notation-on the memo line regarding the purposes of the withdrawals. Following these four withdrawals, the balance in the account fell to $348.45. (BX 15). On September 14, 1995, escrow check No. 923 in the amount of $409.76, payable to Sheila Davis, was presented at the Industrial Bank. The Bank honored check No. 923, and in doing so reduced Respondent's escrow account to a negative balance of $61.3 1. (BX 15). On September 18, 1995, Respondent deposited $100.00 into his escrow account, raising the balance to $38.69.

Bar Counsel learned of the $61.31 overdraft in Respondent's escrow account as the result of investigating two unrelated reports of overdrafts by the Industrial Bank

(neither of which resulted in disciplinary charges against Respondent).[3]

Respondent explained that when he and Ms. Davis worked out the division of the $614.14 amount to be refunded to Ms. Davis, he wrote her a check for $409.76 and postdated it until September 7, 1995 to allow sufficient time for the New York Life draft to clear. He also testified that Ms. Davis agreed not to cash her check until she returned from California. Respondent further explained that when he cashed the $614.14 New York Life draft and took $200.00 in cash, he gave $100.00 in cash to Ms. Davis. Thus, since she agreed not

[3] The first unrelated notice of overdraft from the Bank described a $97.29 balance deficit occurring on August 4, 1995. (BX 1). The second unrelated notice of overdraft described a $15.03 balance deficit on November 30, 1995. (BX 6). After reviewing all the bank records for the first nine months of 1995, the two notices did not identify any ethical violations occurring on the dates provided on the notices. It was during Bar Counsel's review of these bank records that the overdraft at issue here was found notwithstanding the bank's lack of notice.

to cash her $409.76 check for some time, he decided to repay himself $90.00 out of his escrow account which was part of the $100.00 he previously loaned to Mr. Davis. He further explained that when his client called him from California and said she had cashed his check, he realized that an overdraft might occur. He called his bank, told it that he would make a deposit of $100.00, and subsequently deposited $100.00.

Hearing Committee's Findings As To Credibility

Respondent's credibility was a major issue in resolving the alleged violations. When Bar Counsel wrote to Respondent in June 1996 prior to the filing of any charges and asked for a "full and complete explanation for your failure to have sufficient funds on deposit in your escrow account in September 1995 to cover check number 923," Respondent never related that he had given Ms. Davis $100.00 of the $200.00 he had taken in cash on September 1, 1995, nor that the four escrow account checks for $90.00

were reimbursement for the $ 100.00 given to his client. (Tr. 113-117; BX 8, 9). It was only during the hearing that Respondent claimed this advance in fees and that the $90.00 he took out of his escrow account was simply reimbursement of funds owed to him by his client. Ms. Davis also did not corroborate this version of events.[3]

While recognizing "difficulties with Respondent's version of events" (Hearing Committee Report, page 7), the

[3] Ms. Davis testified that she was still a client of Respondent at the time of the hearing, that she was fully satisfied with him and that she still owed him money. (Tr. 28-29). She testified, in response to a general question from Bar Counsel, that it was possible that she had allowed Respondent to use some of the funds that were due to her from this settlement, but she did not specifically mention that Respondent had loaned her $100 when the $614.14 check was cashed on September 5, 1995. She was never asked about this $100 loan when Respondent cross-examined her during the hearing. The Hearing Committee observed that she objected strongly to testifying for Bar Counsel against her attorney. (Hearing Committee Report at 4, n.2.

Hearing Committee found Respondent's testimony to be credible and accepted it as fact. Since the Hearing Committee was able to observe the Respondent's testimony and judge his credibility, we defer to its determination. In re Micheel, 610 A.2d at 234.

Respondent's Procedural Objections

Respondent raised several procedural objections to the proceedings against him which he claims are sufficient to warrant dismissal of the charges against him. These objections were considered and rejected by the Hearing Committee (Hearing Committee Report at 4-5 n.3). We concur that these objections are entirely without merit and thus discuss them only briefly.

Rule XI, § 6(a)(2), in short, authorizes Bar Counsel to investigate any allegation of ethical misconduct by an attorney which comes to his attention but with the restriction that Bar Counsel may not undertake or recommend any

disposition on such allegation until the accused attorney has been given the opportunity to respond to it. In this matter, Respondent's bank on two occasions sent Bar Counsel notice that Respondent had overdrawn his escrow account (the first notice was for an overdraft in August 1995 and the second notice was for an overdraft in November 1995). In the course of investigating these two matters (which included the issuances of subpoenas for bank records from Respondent's escrow account), Bar Counsel located another overdraft in September 1995 for which Respondent's bank did not notify Bar Counsel. It is this overdraft from September 1995 that forms the basis for the charges brought in this matter.[3]

Respondent contends that the instant proceedings should be dismissed because Bar Counsel did not afford him with the opportunity to respond to the September 1995

The overdrafts in August and November, 1995 are discussed above in fn. 7.

overdraft allegation before Bar Counsel began investigating it as a possible violation. Respondent further contends that the investigation of the September 1995 overdraft began when Bar Counsel issued its subpoena for the bank records which disclosed the September 1995 overdraft -- which was in December 1995. Respondent's ultimate contention is that since Bar Counsel started investigating the September 1995 overdraft in December 1995, which was prior to when he received notice that the September overdraft was under investigation on June 11, 1996, he was denied his right to respond to this allegation in a timely manner in violation of Rule XI, §6(a)(2).

This contention is frivolous because Bar Counsel did not learn of the September 1995 overdraft until after he received bank records pursuant to the second subpoena which he issued in December 1995. This second subpoena duces tecum was issued after receiving the second overdraft notice

from Respondent's bank. While it is not clear when the bank produced these records in 1996, it is clear that Bar Counsel notified Respondent within a reasonable time (by June 11, 1996) of when the September 5, 1995 overdraft was being considered as a potential violation. Respondent's claim is also meritless because Respondent was in fact afforded the opportunity to respond to the allegation of commingling with regard to the September 1995 overdraft prior to any action being taken by Bar Counsel. Bar Counsel provided Respondent with the opportunity to respond on June 11, 1996 -- more than two months before Bar Counsel submitted the Petition and Specification of Charges on August 21, 1996 (BX B). Thus, Respondent was given the opportunity to respond to this allegation prior to Bar Counsel petitioning the violation, he was afforded all process due under Rule XI, §6(a)(2). Section 6(a)(2) does not require Bar Counsel, as Respondent suggests, to notify a Respondent of every possible

violation the instant such violation materializes during the course of Bar Counsel's investigation.

Respondent further suggests that the charges should be dismissed because Bar Counsel's subpoenas duces tecum to Respondent's bank were overly broad and possibly in violation of his Fifth Amendment privilege against self-incrimination. Again these contentions are without merit. The subpoenas duces tecum sought records directly relevant to the two overdraft notices sent by Respondent's bank. Indeed Bar Counsel would have been remiss if he had not obtained and thoroughly examined these bank records for the time periods shortly before and shortly after the alleged overdrafts.

Bar Counsel has been authorized to issue subpoenas duces tecum for the "production of pertinent ... papers [and] documents. . . ." Rule XI § 18(a). Rule XI does not contain any requirement that Bar Counsel submit its subpoenas for

prior approval to either the Board or the Court of Appeals. Bar Counsel's subpoena power is limited only by Superior Court Civil Rule 45. See Rule XI, § 18(a) and (b). In addition as we discussed above at page 11, Respondent's Fifth Amendment privilege against self-incrimination does not extend to the production of Respondent's bank records from his bank. Doe v. United States, 487 U.S. at 218-19; Fishe v. United States, 425 U.S. at 411; see also United State's v. Doe, 465 U.S. 605 (1984).

In any event, it appears that these objections are moot because the Hearing Committee did not find a violation of Rule 1. 15(a), and hence the bank records which Respondent complains were improperly obtained were not used against him. The violation that was found does not stem from any subpoenaed bank records but rather from the "non-records" relating to the handling of client funds which Respondent was required to maintain., For this reason also, we reject

Respondent's procedural objections to the underlying proceedings.

The Hearing Committee's Findings As To Violation

Because it credited Respondent's hearing testimony, the Hearing Committee concluded that there was insufficient evidence to find that there had been an intentional or reckless misappropriation of client-owned funds. The Hearing Committee did find, however, that there was clear and convincing evidence that Respondent violated Rule XI §19(f) and Rule 1.15(a) in that Respondent failed to keep complete records of his handling and disposition of funds belonging to another person.

Exceptions to the Hearing Committee's Report and Recommendation

Bar Counsel did not take an exception to the report and recommendation of the Hearing Committee in this second matter (Docket No. 343-95) in light of the Hearing

Committee's findings on credibility. Respondent also did not file an exception.

Conclusion as to Violations

We concur with the Hearing Committee's findings as to violations. There is clear and convincing evidence that Respondent violated Rule XI, § 19(f) and Rule 1. 15(a) in that he failed to keep complete records of his handling and disposition of funds with

regard to his representation of his client Sheila Davis.

III SANCTION

As. a result of our determination that Respondent intentionally misappropriated client funds as well as having committed numerous other serious disciplinary rules in Bar Docket No. 184-93, the only appropriate sanction is disbarment. In re Addams, 579 A.2d 190,191 (D.C. 1990) (en banc); In re Pels, 653 A.2d 388, 389 (D.C. 1995), cert. denied - U.S. -, 117 S.Ct. 58 (1996). The violation in Bar Docket No.

343-95, namely failing to keep complete records of his handling and disposition of client funds, would, if it were the sole violation committed by Respondent, likely carry a sanction of less than a suspension. But because it occurred after the conduct in the first matter had been brought to Bar Counsel's and Respondent's attention, a more severe sanction may have been warranted. See In re Lenoir, 604 A.2d 14 (D.C. 1992).

There are no extraordinary circumstances present suggesting that a lesser sanction would be appropriate. Respondent's dishonesty in attempting to lead his client and Bar Counsel to believe that CIGNA/INA had been paid only aggravates the extent of his misconduct. In re Clarke, 684 A.2d 1276, 1281 (D.C. 1996).

Moreover, the fact that Respondent would come perilously close to misappropriating Ms. Davis' funds in 1995 while under investigation for misappropriating Ms. Holmes' funds

suggests that Respondent is incapable of conforming his conduct within the boundaries set by the Rules of Professional Conduct. See In re Lenoir, supra.

Finally, we note that Respondent has never repaid CIGNA/INA the $2,272.85 statutory lien. Under most circumstances we would recommend that Respondent make restitution of misappropriated funds pursuant to Rule XI, §3(b). Since there is some issue as to the exact amount of the lien, we decline to recommend restitution but note that should Respondent ever seek reinstatement, he will have to address this $2,272.85 statutory lien and what he did to satisfy it. See In re Robinson, 705 A.2d 687 (D.C.1998); In re Roundtree, 503 A.2d 1215 (D.C. 1985).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: _____

Paul L. Knight

May 7, 1998

*All members of the Board concur in this Report and Recommendation except Mr. Rezneck who did not participate. Mr. Knight, joined by Mr. Banks, has filed a separate concurring report.

DISTRICT OF COLUMBIA COURT OF APPEALS

BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:

GREGORY L. A. THOMAS Bar Docket Nos. 184-93 & 343-95

Respondent.

SEPARATE CONCURRING REPORT

While I obviously concur with the Board's report and its recommended sanction for Respondent, I write separately to address Bar Counsel's election not to pursue one of the charges contained in Docket No. 184-93 (see fn. I of the Board's report, supra at p.2). This election not to pursue a charge is addressed separately so as not to deflect attention

from the Board's recommendation of disbarment for the serious misconduct engaged in by Respondent.

As pointed out in footnote 1, Bar Counsel waited until it filed its post-hearing brief to announce that it had decided not to proceed on the Rule 8.4(d) violation in which Respondent was charged with engaging in conduct prejudicial to the administration of justice. Bar Counsel provided no reason for taking this position. The election not to proceed is somewhat surprising as Respondent's hearing was delayed by approximately five months while Bar Counsel pursued an Amended Specification of Charges which only added this Rule 8.4(d) violation and a Rule 8.4(c) violation for dishonesty. The Rule 8.4(d) allegation was based in large measure on the same evidence that established the Rule 8.4(c) violation.

There is a substantial question whether Bar Counsel can unilaterally elect not to pursue a prosecutable charge

which warrants discipline, particularly after it has been presented to and approved by a Contact Member. See D.C. Bar Rule XI, §5(d), §6(a)(2)-(4), and §8(b).[3] The further question that emerges is what should be done with this unresolved charge?

In re Bernstein, No. 96-BG- 1423 (D.C. Jan. 22, 1998) and In re Drew, 692 A.2d 1127, 1132 (D.C. 1997) appear to suggest that unresolved charges should be resolved by the Board even though no finding was made by the Hearing Committee. This is so even if the charges are closely related or even duplicative. 1d.

While the issue here is whether Bar Counsel can decline to pursue viable charges, there is no issue as to whether Bar Counsel can suggest to a Hearing Committee or to the Board that its evidence is inadequate on a specific charge or, where charges are lodged in the alternative, that its proof establishes one violation and not the other.

The Hearing Committee concluded with regard to the Rule 8.4(c) violation that Respondent submitted to his client and to Bar Counsel a fraudulent copy of a check representing payment to CIGNA/INA and falsely represented that such payment had been made. In order to establish the Rule 8.4(d) violation, the only additional determination that must be made is whether the Rule 8.4(c) dishonest conduct of submitting false statements and evidence is conduct which seriously interferes with the administration of justice. In re Goffe, 641 A.2d 458 (D.C. 1994) establishes that it is. Accordingly, it is appropriate to make the further finding that Respondent engaged in conduct that seriously interfered with the administration of justice in violation of Rule 84(d).

It is recognized that this Rule 8.4(d) violation overlaps with the dishonesty violation (Rule 8.4(c)) and further that it will not affect the recommendation of disbarment recommended by the Board. Notwithstanding, a finding on

the Rule 8.4(d) charge is in order in light of In re Bernstein, supra, and In re Drew, supra.

By _____

Paul L. Knight

Dated: May 7, 1998

Mr. Banks joins in this concurring opinion.

DISTRICT OF COLUMBIA

COURT OF APPEALS

No. 94-BG-342 File

In the Matter of May 10, 1994

G.L.A.T., ESQUIRE Court of Appeals

A Member of the Bar of the

District of Columbia

Court of Appeals

BDN: 184-93

BEFORE: Steadman and King, Associate Judges; and Pryor, Senior Judge

ORDER

On consideration of Bar Counsel's motion for an order to show cause why he should not be held in contempt of court, and Bar Counsel's motion for leave to file under seal, it is

ORDERED that the motion for an order to show cause is granted, and respondent shall show cause within 20 days from the date of this order why he should not be held in contempt of court for the conduct specified in Bar Counsel's motion. It is

FURTHER ORDERED that Bar Counsel's motion for leave to file exhibits under seal is granted until further order of this Court.

It is

FURTHER ORDERED that the Clerk shall transmit the pleadings filed in this matter to the Honorable John W. Kern, III, Senior

Judge of the Court of Appeals to conduct proceedings to determine whether respondent should be held in contempt of court.

PER CURIAM

Copies to:

Respondent

1003 K Street, N.W., Suite 803

Washington, D.C. 20001

Hamilton P. Fox, Esquire

Chair

Board on Professional Responsibility

Leonard H. Becker, Esquire

Bar Counsel

Office of Bar Counsel

emb

DISTRICT OF COLUMBIA

COURT OF APPEALS

FILED

No. 98-BG-713

JAN - 7 2000

IN RE: GREGORY L.A. THOMAS, - District of Columbia

Respondent

Court of Appeals

BDN: 184-93

BEFORE: Steadman and Ruiz, Associate Judges; and Gallagher, Senior Judge

ORDER

On consideration of respondent's motion to stay judgment pending petition for certiorari, and Bar Counsel's opposition thereto, it is

ORDERED that respondent's motion is denied.

PER CURIAM

Copies to:

Mr. Gregory L.A. Thomas
613 Pennsylvania Avenue, S.E.
First Floor
Washington, D.C. 20003

Wallace E. Shipp, Jr., Esquire
Acting Bar Counsel
Office of Bar Counsel

Patricia A. Brannan, Esquire
Chair
Board on Professional Responsibility

emb

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeapardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

Same: How made, Whenever under these Rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the Court. Service upon the attorney or upon ā party shall be made by delivering a copy to the

attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the Clerk of the Court. Delivery of a copy within this Rule means: Handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

Super. Ct. Civ. R. 5(b).

The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules. The Superior Court may appoint a committee of lawyers to advise it in the performance of its duties under this section

D.C. Code § 11-946.

> Issuance of subpoenas. In carrying out this rule, any member of the Board, any member of a Hearing Committee in matters before the Committee, the Executive Attorney, or Bar Counsel in matters under investigation may, subject to Superior Court Civil Rule 45, compel by subpoena the attendance of witnesses and the production of pertinent books, papers, documents, and other tangible objects at the time and place designed in the subpoena.

D.C. Bar Rule XI, § 18(a).

> Disciplinary sanctions. (a) types of discipline. Any of the following sanctions may be imposed on an attorney for a disciplinary violation:

* * *

(5) informal admonition by Bar Counsel;

D.C. Bar Rule XI, § 3(a)(5).

Conditions imposed with discipline. When imposing discipline, the Court or the Board may require an attorney t make restitution either to persons financially injured by the attorney's conduct or to the Client's Security Trust Fund (see Rule XII), or both, as a condition of probation or of reinstatement. The Court or the Board may also impose any reasonable condition, including a requirement that the attorney take and pass a professional responsibility examination a condition of probation or of reinstatement.

D.C. Bar Rule XI, 3(b).

If a matter is disposed of by an informal admonition, Bar Counsel shall promptly send respondent a letter admonishing respondent. The letter shall recite the misconduct in summary form and specify the disciplinary rule or rules which respondent violated. Bar Counsel shall promptly send a copy of the letter of admonition to the complainant. Informal admonitions shall otherwise be treated as confidential except as provided in Rule 6.5

Board Rule 6.2

Except in the case of motions dealing with evidentiary matters that arise during the hearing, all motions must be made in writing in the form of a pleading and in compliance with *Rule 16.7.* Motions must be filed with the

> Board Office and served in accordance with *Rule 16.2* and *16.3*.

Board Rule 7.11 (emphasis added)

> CHAIRMAN BORAKS: Okay. Now, Messrs. Thomas and Alfred, you've reserved opening statements.
>
> Does somebody want to give one now?
>
> MR. THOMAS: Yes, I think we would.
>
> CHAIRMAN BORAKS: We would be happy to hear it.
>
> MR. THOMAS: Mr. Chair, members of the Board, my counsel and Bar counsel, Bar counsel has charged four violations and amended specification charges, six individual violations.

Hearing Tr. of 10/11/95 at p. 183, L17 through p. 184, L4.

* * *

Now, the other thing that I think is even more compelling in this case is not only the conduct of Respondent that certainly is not beyond reproach, but also the conduct of Bar counsel. Bar counsel has, in this whole case, and the evidence will show, engaged in a concerted and a calculated method to initiate these proceedings.

And, we believe that the evidence will show that no just cause, that these proceedings were initiated contrary to the rule which provides an opportunity for a response.

MR. BORAKS: Mr. Thomas, I'm sorry to interrupt you, but I just noticed that somebody is in the courtroom. And if its a witness --

Hearing Tr. of 10/11/95 at p. 188, L22 through p. 189, L2.

* * *

MR. BORAKS: Okay. I'm sorry to interrupt you. Go ahead.

MR. THOMAS: Yes, sir. And, at the risk of trying to present an O.J. defense, an O.J. Simpson defense, what you will find in this case is that Bar counsel purposely served a subpoena before any type of formal proceedings was initiated, purposely served the subpoena even though counsel had distributed all the monies or in process, and he knew the money was distributed.

He served a subpoena on the bank for the express purpose to audit my accounts or the Respondent's accounts. And, after serving the subpoena and getting the information, he served an additional subpoena upon me to get the same information for no other purpose than

to try to incriminate me as far as what he had discovered in his unauthorized audit of my accounts.

We believe that there is a measure of -- Board hearings, like any other hearings, that there are limits to Bar counsel's conduct. I think that certainly Bar counsel's discretion is quite, quite broad.

But, Bar counsel is a members of this Bar as well. And, Bar counsel is subject to the same rules and regulations presumptively as other government agencies and certainly would come under unreasonable searches and seizures as anyone else.

We believe that the evidence will show that the evidence relative to all the checking accounts, all the information that was relied on

by Bar counsel pertaining to -- that was gathered, pursuant to the subpoenas that were issued in this case, should be disallowed and disregarded and should not be considered in weighing the merits of the defenses presented nor to the charges asserted.

And, we feel that's the only remedy available. And, we feel that the case law supports that proposition.

At this time, we will be calling myself as the first witness in the case.

CHAIRMAN BORAKS: I want to clear something up. The evidence that you were just referring to, does that include portions of the exhibits introduced by Bar counsel into evidence?

MR. THOMAS: Yes.

CHAIRMAN BORAKS: Okay, because I had understood that there was no objection to those. But, now I'm hearing you say something perhaps different than that.

MR. THOMAS: Well, maybe I'm misunderstanding what you are asking. We have no -- they are -- you know, the authenticity of the exhibits, I mean, we don't question.

CHAIRMAN BORAKS: No, we are talking about admissibility at this point, admissibility. He moved their admission into evidence.

I sought to determine whether, on the Respondent's side, there was any objection. And, I was told that there was none.

MR. THOMAS: There are none. They support exactly what we are saying as far as Bar counsel.

Most of them support, along with our exhibits -- when Bar counsel exhibits are looked on along with our exhibits, we think it will give a fair picture of the factual scenario involved in the case.

CHAIRMAN BORAKS: I just though you were telling me, or telling us, just now that you thought that certain evidence that had been gotten by Bar counsel should be suppressed and not paid attention to.

MR. THOMAS: Okay. I apologize. Well, if that the impression -- I don't recall -- in fact, let me just look at this again.

And, let me just reserve on that, because all of the Bar counsel's exhibits relative to bank statements, you know, that were obtained through the subpoenas that were issued, those are the ones that we are objecting to.

CHAIRMAN BORAKS: Are there any that are part of that exhibit book?

MR. THOMAS: I think all the bank statements are.

CHAIRMAN BORAKS: Okay. So, you would like to withdraw your previous statement that --

MR. THOMAS: Yes.

CHAIRMAN BORAKS: -- you don't object and object to the bank statements --

MR. THOMAS: The bank records.

CHAIRMAN BORAKS: -- on the grounds that they were improperly obtained?

MR. THOMAS: Yes.

CHAIRMAN BORAKS: Okay. I'm going to admit them subject to further proceedings that may establish some basis for reconsidering that.

But, as the record stands right now, I don't see any basis to exclude them. So, I will admit them provisionally.

MR. THOMAS: All right, sir.

Hearing Tr. of 10/11/95 at p. 189, L8 through p. 193, L18.

* * *

CHAIRMAN BORAKS:

* * *

Now, the hour is late. We really want to finish up today. I'm going to, particularly in

light of the fact that there is significant post hearing briefing involved in these cases, I'm going to restrict closing statements to 10 minutes.

Hearing Tr. of 4/18/96 at p. 217, L3-7.

* * *

CHAIRMAN BORAKS: Gentlemen, one of you wants to speak?

Mr. Thomas.

Hearing Tr. of 4/18/96 at p. 224, L3-5

* * *

MR. THOMAS:

* * *

I say to you, the issue here, and it is certainly one, is what limits are there on Bar Counsel. He just goes in and sends out subpoenas and pulls an escrow account, audits

it, and searches for something and brings formal charges? If that's what authority he has under the rules, I think the legal community needs to know it.

I disagree with it. If he had not served that subpoena and his assistant who apparently worked for him, he never had any -- he testified he never changed his mind as far as whether he thought there was a case or not.

The first memo was dated October 8th, and I believe the other one was sometime in November. Before that month had even run, after the hearing, immediately after, we must have walked out of that hearing on the 18th or 19th of November, and he served the bank for the documents, went through them, audited

and looked. And he was looking for something. It is clear.

I believe there is no way that this Committee or any court of justice would find that this, based on that evidence, bank evidence, there is no way you can find any violation, none. This was a railroad, and it is an abuse of power.

He does not have that kind of power, or he shouldn't. At least people need to know about it.

I believe the Committee ought to try to see whether, first of all, in their own mind they could find me guilty on any one of those charges without those bank statements, without those bank statements on all of them, and see what kind of case he has.

Then if you believe that it is an appropriate way to take that evidence, then I know what you are going to do. But he had no right. I was working with him three months in this case. I have had a new realization with Mr. Dicker on this. But, I mean, that's where you live and learn.

I believe that that evidence ought to be suppressed. I think it is tainted. I think if any proceedings are brought in the future on it, it ought to be closed out. That is a serious violation.

We still have rules of conduct that he comes under the same rules I come under. That's really what I believe.

From that I appeal to you to deny this.

Hearing Tr. of 4/18/96 at p. 227, L1 through p. 229, L3.

* * *

CHAIRMAN WOLFSON: If you both want to make a brief closing statement and then the committee will go into executive session.

* * *

Hearing Tr. of 10/17/96 at p. 152, L14-16.

* * *

CHAIRMAN WOLFSON: Mr. Thomas?

MR. THOMAS: And I want to try to -- there's a couple of things about this case that's bothersome for me, as a member of this Bar, and I heard what the committee said about affirmative defenses. You know, I have purposely -- we're talking about $90. And you've heard -- the witness who was called,

who is my client was subpoenaed by Bar Counsel

Now, you know, at what point -- I mean, that was his witness, he could have cross-examined her on handling the money, whether she got $100. Maybe he already had. I don't know. You know, but what I find disturbing about this case, you know, is as I've indicated, there is no notice in that file, in those exhibits, no notice that shows Bar Counsel was notified by the bank that the escrow account was overdrawn. Nothing. The only thing that they offered was Exhibit 19 which we objected to, it was excluded.

And I'll tell you why. Because Bar Counsel already had the records. As I was sitting in a hearing in the Ray case, as I was

sitting in a hearing on another charge he brought against me, Mr. Dicker was auditing my account. And you know why he was doing it? He was auditing because of that case that I got involved in, representing the attorney. And this is --

CHAIRMAN WOLFSON: Mr. Thomas, I understand why you're saying this and we hear what you're saying, but really -- I would rather that you address the matters that we're clear on, what's relevant, which is --

MR. THOMAS: The evidence. That's what I'm trying to do.

CHAIRMAN WOLFSON: I think it will help you if you focus on that.

MR. THOMAS: And I understand that.

CHAIRMAN WOLFSON: We understand your point of view about the charges. Don't worry about that. But I really think it would be more useful to yourself to focus on what happened with the checks and so forth.

MR. THOMAS: Well, I know, and I understand that, certainly I understand, but my account is probably being audited right now, and yours may be being audited as well, but anyway, get to the point, which is misappropriation.

You know, misappropriation, is it when the bank notifies you that there is an overdraft? You know, ther rule doesn't say -- case law doesn't sau that's misappropriation. Certainly that might give rise to an investigation by Bar

Counsel, you knnow. I mean as he said, it's something that dosen;t happen infrequently. That's his words.

Does he subpoena all the accounts of all the attorneys that happen to or does he just concentrate on the little attorneys in the bing law firms or how does he come up with who he is going to do it to?

Hearing Tr. of 10/17/96 at p. 158, L19 through 161, L13

* * *

I don't think Bar Counsel has got anywhere close to meeting his burden on the misappropriation and its a scary charge, standing here talking about $90, $90 clearly belonging to me, if the client didn't disagree. In fact, the client said she owed me more money than that.

Whether you look at it as -- whatever, but I'm just saying on that bit of money that we're talking about, to sit here with a straight face and act like this is something other than what it is, and it's not an affirmative defense, I would take strong exception to that. I don't think this is the type of case -- and there's something wrong with this if the person who -- that Mr. Dicker hadn't even talked to the client until after the charges I understand were filed. I never heard anything from him.

Hearing Tr. of 10/17/96 at p. 162, L7-22.

* * *

CHAIRMAN WOLFSON: All right. Let's go back on the record. The committee has met in executive session and we have some tentative conclusions. Our tentative conclusion

is that it has not be proven that there was any misappropriation of client funds and in particular, we are not persuaded, at leasts there is not clear and convincing evidence that any withdrawal by Mr. Thomas from the trust account was unauthorized by Ms. Davis.

Turning to the other charge, the charge based on Rule 1.15A in which it is alleged that Mr. Thomas failed to maintain complete records of the disposition of funds, we are tentatively inclined to find that there is a violation to maintain complete records, but are certainly interested in further written briefings and proposed findings of fact on that.

Although it is a violation, assuming that we continue to find the violation, I think we would be inclined to impose a very

moderate sanction for that, assuming there's nothing in aggravation, but those are your tentative conclusions.

Is there anything that would be proposed in aggravation, Mr. Dicker?

MR. DICKER: With the committee's indulgence.

(pause)

I am not certain at this time. My mind went blank on that. I'm not saying that there is a record of prior discipline or there's not. At this moment I stand here and I'm embarrassed that I don't have the answer, I should know it, but it's something that we can submit with the record, I mean with our briefs.

Hearing Tr. of 10/17/96 at p. 163, L9 through p. 164, L20.

* * *

IN THE

DISTRICT OF COLUMBIA COURT OF APPEALS

In the Matter of:

GREGORY L.A. THOMAS, Bar Docket Nos. 184-93

ESQUIRE 345-95

Respondent

RESPONDENT'S NOTICE OF EXCEPTION

TO REPORT AND RECOMMENDATIONS OF

THE BOARD ON PROFESSIONAL RESPONSIBILITY

GREGORY L.A. THOMAS ("Respondent") hereby excepts to the Report and recommendations of the Board on Professional Responsibility ("Board") in the above-captioned cases dated May 7, 1998 in the following particulars:

1. The Board's "underlying facts" are unsupported in the records taken as a whole.

2. The Board's rejection of the Hearing Committee's finding of insufficient evidence for establishment of statutory

lien on settlement proceeds, and substitution of a second unspecified charge of misappropriation is unsupported by clear and convincing evidence, and runs contrary to applicable law.

3. The Board's sua sponte joinder of Bar Docket Nos. 184-93 and 343-95 for purpose of submission of its report and recommendation was prejudicial error.

4. In recommending appropriate sanctions, the Board failed to take into account mitigating factors.

Respectfully submitted,

Gregory L.A. Thomas
613 Pennsylvania Avenue, S.E.
First Floor
Washington, D.C. 20003
202-347-1300

PRO SE